UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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CHARLENE CARTER — 3:17-cv-02278-S

VS. — DALLAS, TEXAS

TRANSPORT WORKERS UNION OF AMERICA LOCAL 556, et al — DECEMBER 14, 2018

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TRANSCRIPT OF MOTION PROCEEDINGS
HEARD BEFORE THE HONORABLE KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

(Call to order of the court.)

(Off-the-record discussion.)

THE COURT: This is Case No. 3:17-CV-02278-S, Carter versus Transport Workers Union of America Local 556, et al.

Counsel, make your appearance on the record, please.

MR. GILLIAM: For the plaintiffs, Matthew Gilliam.

MR. JENNINGS: Jeffrey Jennings.

THE COURT: Thank you.

MS. GEHRKE: For Defendant Southwest Airlines, Michele Gehrke.

MR. GREENFIELD: For Defendant Local 556, Adam Greenfield.

THE COURT: Thank you.

It's my understanding that Southwest will go first, so please proceed.

MS. GEHRKE: Thank you, Your Honor.

Your Honor, as we briefed in our motion papers, we believe the case should be dismissed with prejudice for several reasons.

First, the Court lacks subject matter jurisdiction to hear the case.

Second, Ms. Carter is trying to simply relitigate her claims after they've already been litigated and factual and

legal issues decided in arbitration by arbitrator Bill Lemons after a two-day hearing where she had a full opportunity to present evidence, cross-examine witnesses, and present her case.

And then finally we believe the allegations as pled, they fail to state a claim on multiple grounds.

So I will go into some more detail and elaborate on some of the points we have already made in our briefing; and, of course, if you have any questions along the way, please feel free to ask.

So on the jurisdictional issues, as the Court is aware, the Railway Labor Act is a very unique statute and there's not a lot of case authority on some of these issues, so we appreciate the opportunity to provide some oral argument on them.

On the claims under 152, Section 3rd and 4th, the heart of those claims is really the allegation that the employer, here Southwest, would be interfering with the right of employees to freely choose their representative for collective bargaining purposes and to organize.

And the cases are fairly clear that those two RLA claims only apply in the situation where it's in precertification stage where there is not already a union certified as a bargaining representative. And the reason for that is important because once a bargaining representative is

certified and the parties negotiate a collective bargaining agreement, part of that is the grievance and arbitration procedure.

And so that's really where all of these types of minor disputes are funneled into. But before a union is certified, there is no forum and so that's where those types of issues having to do with organizing employees and letting employees choose which union they want, that's where those RLA claims came in for purposes of court jurisdiction.

So here there has been a union in place for a long time. There's an established collective bargaining agreement with a very robust grievance and arbitration procedure, and there is no basis for Ms. Carter to bring her claims here in court.

And we cited to the *TWA* case, that's at 489 U.S. 426 and then the *Held* case, 2007 Westlaw 433107. The *Held* case is very similar factually to Ms. Carter's case in the sense that it involved an employee who had a dispute over union representation issues and was terminated for some of his actions in making vulgar statements.

And the Court there held that the Court did not have jurisdiction to hear the dispute under 152, Sections Third and Fourth of the RLA, and that's because there was an adequate remedy and that was to go through the grievance and arbitration procedure.

The very limited circumstances where Courts have found federal court jurisdiction for 152, Third and Fourth, claims don't apply here and that's when there's extreme anti-union animus that's been alleged or some other attack on the CBA process where the employer is interfering with the employee's choice of representation by a certain union. And that's not the allegation here.

Ms. Carter has her own disputes with the union and union leadership, but that's no allegation that Southwest is interfering with some kind of election process or anything like that.

So I mentioned before this notion of kind of a minor dispute and that this issue belongs in arbitration. And the reason why it's a minor dispute is because at the essence she's challenging discipline imposed on her in terms of her termination for her actions in the workplace and that's exactly the issue that was litigated in the arbitration with Mr. Lemons.

Now, under the contract the legal issue to be decided was whether or not there was just cause to terminate her; but as part of that we presented two days' worth of testimony and evidence and she presented extensive evidence regarding her religious beliefs and her squabbles with the union to try to justify her actions in sending those graphic messages to Ms. Stone and putting some of the other messages on

Facebook that she did and the arbitrator considered all of that. And as part of that process, he made very detailed factual findings which we laid out for you in the briefing.

And it's important to note if you look at the *Grimes* case, which is at 746 F.3d 184, it's a Fifth Circuit case that touched on this issue of whether or not there should be issue preclusion. We recognize that there's no claim preclusion in the sense that she could potentially try to bring federal or statutory claims in court because they're different from a contract issue that was litigated in arbitration.

But *Grimes* is very clear that you can still have issue preclusion because the factual determinations made by the arbitrator can be binding if certain procedural safeguards are met and that's exactly what happened here.

Like I said, we had two days of testimony. She presented and cross-examined witnesses and had extensive documentation, which included all of the evidence that you would be hearing if you were to proceed in this matter about her religious beliefs and what motivated her to send those messages as well as her problems that she was having with the union and union leadership.

And she was represented by counsel, the same lawyers who are here today. So, you know, discovery -- counsel had asked that we may need discovery because some of these issues are not appropriate at this stage and we've had

extensive discovery because of those proceedings because of all the testimony that was heard and the information exchanged.

And then Mr. Lemons issued a very detailed, well-reasoned, written award as part of that arbitration, which we included as an exhibit to my declaration, which we believe is properly before the Court since we are challenging subject matter jurisdiction.

So we outlined in our briefing some of the key factual findings that Arbitrator Lemons made, but I wanted to repeat a few of them because I think they're really important in terms of the types of issues that you would be called upon to consider if this case were to proceed here in court.

So besides just the fact that he determined that there was just cause to terminate her beyond a clear reasonable doubt, he also made factual findings that she violated the social media policy, Southwest workplace bullying and hazing policy, and Southwest harassment policy. And he made the finding that each of those policy violations was a sufficient basis to terminate her.

And significantly for purposes of the types of claims she is trying to raise here, he found that she was not treated less favorably than other employees who had been disciplined for social media violations and that based on the evidence she presented at the arbitration, which did include, you know, other employees that had been disciplined for social

media violations, he rejected her arguments and said that those situations were not substantially similar to her situation and so Southwest did act properly in terminating her even though it may have either offered a lesser amount of discipline or later reinstated those other employees. So that was a key factual finding with respect to whether or not similarly situated people were treated the same or differently, which I think is relevant to her religious discrimination claim.

He also made a factual finding that Audrey Stone, the union president who was the recipient of Ms. Carter's Facebook posts and those graphic abortion videos and images, that Ms. Stone did not report Ms. Carter to retaliate against her because of the union conflict, but that because she believed Ms. Carter had violated company policy and had crossed a line that for her was very personal and very traumatic and upsetting for her.

And she gave very emotional testimony during the arbitration that this was very different from the years of messages that she had received from Ms. Stone [sic] about some of these union issues and the leadership issues and how union dues were spent.

This was something completely different and really crossed the line for her because she was accusing Ms. Stone of supporting murder, of supporting abortion, just because she had attended the Women's March in Washington DC on

behalf of a Southwest committee.

And so Arbitrator Lemons heard all that testimony, both from Ms. Carter, Ms. Stone and other relevant witnesses, and made the factual finding that there was no retaliatory intent by Ms. Stone in reporting Ms. Carter to Southwest.

And he also made the finding that she did not report Ms. Carter because of any concerns or problems she had with respect to union dues money and how union dues money had been spent. Those discussions and messages between them, which Ms. Stone never answered Ms. Carter, but Ms. Carter has been sending them for years, that had been going on and Ms. Stone never reported her and never engaged her in a dialogue on Facebook, although I think there are plenty of communications among union members regarding those issues, but that that was not a motivating reason for her to report the harassing messages to Southwest, which ultimately triggered the termination.

And then also significantly with respect to some of these RLA statutory claims, Arbitrator Lemons made a factual finding that Southwest does not have a policy or practice of either disciplining or not disciplining employees based on their views with respect to Local 556 or Ms. Stone's leadership.

There was plenty of evidence presented at the

arbitration of both union objectors and union supporters who had faced discipline for social media violations; and while Ms. Carter and her lawyers had argued that Southwest somehow was favoring the union supporters, Arbitrator Lemons rejected that argument in his factual findings.

And then he agreed with Southwest that the degree of discipline, which was termination, was warranted even though Ms. Carter had a clean disciplinary record over her years at Southwest Airlines. Because the misconduct was so severe, he made the finding that termination was appropriate.

And then finally he made the factual finding that she had failed, despite presenting argument and evidence, that other employees who didn't share her abortion views or who didn't share her views on the union, that they were somewhat treated more favorably and Arbitrator Lemons rejected those arguments.

So this is just a long list of all of the findings or some of the more significant findings that Arbitrator Lemons made after a very contentious and thorough hearing after two days where she had the opportunity to present all of her arguments and she did.

So we would submit to the Court that the statutory and constitutional claims are not barred by *res judicata*. They are barred because of the doctrine of issue preclusion under those factual findings and should be binding

here under the *Grimes* matter.

The other reason why we think the case should be dismissed with prejudice is under Rule 12(b)(6) and that's because Ms. Carter failed to allege sufficient allegations to state viable claims as a matter of law and she's already had one opportunity to amend her complaint, so we believe further leave to amend would be futile. So I will go through kind of each of our key points on that.

With respect to the RLA claims and whether or not there's a sufficient basis for this Court to exercise jurisdiction under those very narrow grounds that I referenced before, she has not alleged any facts to show that there's some kind of anti-union animus by Southwest towards TWU.

She has not alleged that there's been any threat to the collective bargaining process or that the arbitration process was unfair or that she was somehow deprived any type of due process that she was owed. Her issues are really personal to her and between her and her union leadership; and while she has alleged a duty of fair representation claim against the union with respect to Ms. Stone being the one to file the complaint that ultimately led to her termination, she has not alleged that TWU acted improperly in how they handled the grievance process.

They actually succeeded in representing her as part of the earlier steps in the grievance process. Southwest

did try to resolve the matter by offering her a conditional offer of reinstatement, which she declined; and the union gave her the option to proceed to arbitration with her own attorneys and she has chosen to do that. But she has not alleged that TWU did anything wrong with respect to the grievance and arbitration process.

So I think that's really important because without those types of allegations, there really is no basis to invoke federal court jurisdiction under those limited exceptions that I referenced earlier, the RLA 152, Third and Fourth, claims.

And then, you know, her claims really stem in large part based on her allegations of retaliation and that the termination and the reporting of her social media messages were for retaliatory reasons; but I think her own allegations in the complaint undercut that argument.

She alleges that she started having conflict with the union leadership all the way back in 2012. That was more than five years before her termination. And she started making comments about these union issues and her views on abortion all the way going back to at least 2012. And she alleges in her complaint that she resigned her union membership in 2013 and that she sent those graphic messages to Stone all the way in 2017. But she had sent her for years, messages critical of both Stone as a union leader and of how the union dues money

was being spent all the way back in 2015.

So there's just no temporal connection at all between what she alleges is the protected conduct and the protected activity and the adverse action that occurred five years later. If her theory were true that it was union animus or it was her messages regarding the union issues, then her termination would have occurred all the way back in 2012 through 2015.

It wasn't until the nature of those messages changed and they became very personal attacks on Ms. Stone and very graphic, disturbing images with abortion messages, that's what compelled Southwest to have to take action because as an employer they are bound by equal opportunity laws and they have to provide a harassment-free work environment for their employees.

And even though Ms. Stone is a union leader, she is still a Southwest employee and she still is subject to Southwest policies and she's still entitled to the protection of those policies. And when she received those messages, she thought long and hard and was very torn about turning Ms. Carter in because she knew that it could have very serious ramifications, which is why she really was heartbroken about having to do that. That was her testimony.

But she really felt that these messages crossed a line. This was not just a squabble about union dues and union

leadership. She was accusing her of supporting murder and the killing of fetuses.

But the bottom line is there's just no timing. There's no causal connection at all that's alleged in the complaint and the allegations that are in there severely undercut and would make any kind of retaliation claim fail as a matter of law because there could not be that kind of causal connection.

Then on the issue of whether or not these messages that Ms. Carter sent, whether or not they were entitled to protection under the labor laws, that really is a relatively novel issue under the Railway Labor Act. I think both sides have cited some cases under the National Labor Relations Act by analogy because sometimes since there are some very critical differences between these two statutes, but they often do have a lot of similarities and Courts do sometimes look to cases under the National Labor Relations Act when interpreting the RLA.

But there is the *Held* case here involving American Airlines out of the Northern District. And in that case, the district court did adopt a ruling that even if you were to assume under the RLA that certain speech could be protected under federal labor law, just like as under the NLRA --

THE COURT: Wait a minute. "*Held,*" you said

"Northern District." That's Illinois, right? H-E-L-D?

MS. GEHRKE: That's correct. That's out of Chicago. It did involve American Airlines, but it's not here.

THE COURT: It's not binding on this Court.

MS. GEHRKE: Correct.

THE COURT: Do you have anything that is binding on this Court?

MS. GEHRKE: We're not aware of anything under the Railway Labor Act that would be a Fifth Circuit case that has addressed this particular issue.

THE COURT: Anything from the Courts within the Fifth Circuit?

MS. GEHRKE: Not that I'm aware of, Your Honor.

THE COURT: Okay.

MS. GEHRKE: But I think if you look at the cases in other circuits and in other district courts under both labor statutes, it is pretty clear that at some point conduct can cross a line and lose any protection that it might have otherwise had.

And I think the type of conduct that Ms. Carter admitted during the fact-finding as part of the grievance process and admitted during the arbitration that she sent these messages, they clearly cross the line into vulgar and offensive and harassing conduct that would lose any protection that the labor laws may provide.

She herself described the messages as graphic and warned any viewers that they were graphic and that was part of her point. She wanted to make the point and kind of shock the conscience and I think it was intentional that she sent them to Ms. Stone.

And then on the issue of whether or not she can raise these constitutional claims, Ms. Carter makes the novel argument that because Southwest has a contract with TWU and is collecting union dues under federal labor law, that that somehow makes them a state actor.

We don't feel that that's a viable legal theory. They haven't cited any cases that have supported that. The limited cases that are out there all have to do with public employers and whether or not public employers can require employees to be members of a union and pay dues, but that has not been extended to private employers such as Southwest. And Southwest is a publicly traded company. It is a private company in the sense that it's not a state actor, so we believe those constitutional claims should be dismissed.

And then I'll conclude with some argument regarding her claim for Title VII religious discrimination. Ms. Carter claims that Southwest should have accommodated her religious views on abortion and her need to spread the word that others should not engage in abortion because it's the taking of a human life based on her beliefs. But the cases are

clear that there's no duty to accommodate an employee when it would involve harassing or infringing on the rights of coworkers or others in the workplace.

And I think, first of all, she did not raise her religious beliefs as a justification until after the fact when she was brought into the disciplinary process and then she raised it again during the arbitration to try to justify her conduct which Arbitrator Lemons rejected.

But the cases have held that an employee who has a sincere religious belief, while they can request accommodation, they need to do that before they are disciplined; and it needs to be part of this interactive process that we have when you are requesting religious accommodation.

And she didn't do that here. She did not allege that she did that here. She just alleges that because she holds this belief that she should be allowed to send these messages to other employees or to anybody else that she wants to in the workplace.

And we believe that the law is clear. If you look at the *Chalmers* case, I think that was a Fourth Circuit case, then the *Peterson* case out of the Ninth Circuit, both of them have very good discussion on the fact that while employers do have a duty to accommodate religious beliefs, they do not have a duty to do so when it would involve conduct that would

be harassing or potentially violate equal opportunity laws.

And I think we made the point in our brief that Southwest would be in a rock and a hard spot if they had ignored Ms. Stone's complaint because then they could have been accused of tolerating harassment in the workplace.

So they had to take action, and they did so in accordance with their policies and their procedures in the collective bargaining agreement. So we would ask that Ms. Carter's case be dismissed with prejudice.

THE COURT: Thank you.

MS. GEHRKE: Thank you.

THE COURT: Mr. Greenfield?

MR. GREENFIELD: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. GREENFIELD: Defendants Local 556 also move under 12(b)(6) to dismiss --

THE COURT: I was telling my law clerks about this case. I don't think I've seen both a union and a company on the same side of the "V" very often.

MR. GREENFIELD: Ms. Gehrke and I were having a good joke earlier about sitting on the same side of the table the other day. It doesn't happen very often.

But today we do have very similar grounds and so I will try my best not to rehash arguments already made by Ms. Gehrke. But we also move under 12(b)(6) for failure to

state a claim upon which relief can be granted.

Plaintiff Carter has alleged two distinct areas of allegations against the union -- retaliation and a breach of duty of fair representation.

To address the retaliation aspect first is well established law in the Fifth Circuit and the entire country that in order to have a retaliation claim, you must have an adverse protected activity on behalf of the plaintiff and then some sort of adverse employment action. We would contend that neither are present here.

If I may address adverse employment action first, the union is not Ms. Carter's employer. They represent her for purposes of the collective bargaining agreement. The union can take no adverse employment action in regards to terminating Ms. Carter's employment.

All of the case law cited by opposing counsel on this matter does not deal with an issue of -- the cases they cite deal with direct retaliation. In *Brady* specifically, it was a violation of CBA provision requiring the plaintiff in that case being a member of the union in good standing and so withholding -- preventing them from paying union dues or allowing them to be a member was the retaliation.

In this case no adverse employment action has taken place and just cannot. The only adverse employment action that could be alleged by Ms. Carter is that

President Stone reported bullying and harassment to Southwest Airlines. It was then on Southwest Airlines to determine what they wanted to do with that complaint.

Certainly Ms. Stone's position as the president of the union does not take away her rights as an employee to be free from discrimination or harassment within the workplace.

On the issue of protected activity, I would concur with Mrs. Gehrke that it is a bit murky regarding the free speech laws, but I think she is spot on -- retaliation regarding those free speech laws. But I think she is spot on regarding the temporal proximity issue.

If we look to Fifth Circuit law in the employment context of Title VII, et cetera, *Johnson v. McDonald,* as little as two years of distance between the protected activity, which would be anti-union animus alleged by Ms. Carter, started in 2012. The termination didn't even take place until 2017.

The inciting issue that they are discussing is Ms. Carter's e-mail to President Stone, Employee Stone, that included, in her words, graphic material including pictures of aborted fetuses and alleging that Employee Stone supported murder.

On the issue of breach of duty of fair representation, the plaintiff must show that 556 must have acted either arbitrarily, discriminatorily, or in bad faith to trigger those laws.

The plaintiff's evidence is that Ms. Stone complained to Southwest Airlines of what the plaintiff admits is graphic material by e-mail. Certainly reporting graphic material in context of a hostile work environment to the company is not arbitrary, discriminatory, or made in bad faith.

The record also goes on to support that as far as a breach of duty of fair representation, the union, even after Ms. Stone reported Ms. Carter to Southwest Airlines for her actions, there was a fact-finding meeting.

And at that fact-finding meeting, the union provided Ms. Carter representation. The union actually represented her and was able to negotiate a 30-day suspension with a return to work. It was Ms. Carter who refused to accept that deal and move forward to a hearing on the merits, which she was ultimately unsuccessful on.

Ultimately, Your Honor, there is no law or case law that the plaintiffs can cite to abridging Ms. Stone from seeking a nonhostile work environment, which is the claim that incites all of this matter.

And as such, we ask that this Court dismiss all claims against Local 556 as we did not take any adverse employment action and reporting a hostile work environment cannot be a breach of duty of good faith -- excuse me. Breach of fair representation on behalf of the union.

THE COURT: Okay.

MR. GREENFIELD: Thank you.

THE COURT: Okay. On behalf of the plaintiff, just so you're aware of timing, Ms. Gehrke took a little more -- just a couple of minutes more than 20 minutes, Mr. Greenfield took a lot less. So we have a total of. They did a total of 30 minutes, which I told you you're entitled to at least.

MR. GILLIAM: I appreciate that, Your Honor.

THE COURT: A little bit over is not a big deal.

MR. GILLIAM: I have to admit I'm not very technologically savvy. It sounds like it's on.

THE COURT: It's definitely on. Let me ask you this. You know more than anyone here how long you're argument is going to go. My whole point about bringing that up is do you want to break now, or do you want to just get into your argument?

MR. GILLIAM: Your Honor, I would rather just move on right now.

THE COURT: Okay. That's fine with me.

MR. GILLIAM: Okay. Well, good afternoon and may it please the Court.

Your Honor commented on how unusual it is to see the employer and the union on the same side --

THE COURT: From my view of the world, okay?

MR. GILLIAM: But that's precisely why we are here. It's because the employer and the union can work together to

silence an employee's speech and organizing rights under RLA 152, Third and Fourth, and that's precisely why it provides a cause of action for employees like Ms. Carter.

This case is about airline employees' protected speech and organizing rights as well as her Title VII freedoms from religious discrimination and fundamentally the Supreme Court in *Old Dominion v. Austin* -- I'll refer to the case as *"Austin"* -- recognized that labor disputes get very heated. In fact you often see an exchange of language that's very caustic, very emotional, very sharp and is actionable per se in some jurisdictions.

Nevertheless, the Supreme Court said that federal labor law policies protect that speech. It affords very robust protections to employees' speech. And not only were the speech protections recognized as protected in *Austin,* but subsequently federal courts have recognized the holding in *Austin* and applied it in the context of RLA. One of those cases is *Konop v. Hawaiian Airlines* from the Ninth Circuit in 2002; another is *Dunn;* and those cases explicitly recognize those protections.

And whatever Southwest's characterizations of the communications that Ms. Carter sent to the union president, in many ways its arguments exceed the scope of what we're here to do today, which is to determine the motion to dismiss and upon motion to dismiss the plaintiff's factual allegations are

entitled to an assumption that they are true and I guess what I'd like to start off with is the arbitration.

As a threshold matter, the Court should not consider Southwest's extra pleading materials. In their brief, Southwest cited some cases from New York, *Stacks* and *Schwab,* for the proposition that on a Rule 12(b)(6) motion a court can take judicial notice or actually can decide *res judicata* and issue preclusion.

Well, it doesn't stand for that proposition if you look at the cases. What those cases stand for is that the Court can take judicial notice that an arbitration took place. It can't use the opportunity to delve into the purported findings of the arbitration.

And this circuit, the Fifth Circuit, precedent prohibits making *res judicata* and issue preclusion rulings on a 12(b)(6) motion unless it's converted into a motion for summary judgment.

That holding was *Testmasters v. Singh*, and I can give you the citation if you want.

THE COURT: Actually in the back of my mind was the issue of converting this to a motion for summary judgment, which the Court can do on its own; but I want you to touch on that.

MR. GILLIAM: Correct, Your Honor. And certainly the Court can do it, and I would argue that the Court should not

exercise it's discretion to do that.

But first I would also like to mention that --

THE COURT: And you're going to get into why you think the Court should not?

MR. GILLIAM: Yes, Your Honor.

THE COURT: Okay.

MR. GILLIAM: But one step before that, I'd like to point out that nowhere in the complaint do Carter's allegations make any reference to the arbitration, and they're not central to her claims.

To understand what it means to be central to their claims, the Court should look to a case called *Scanlan* out of the Fifth Circuit and there on a motion to dismiss, the defendant attached a report to their motion to dismiss and the Court recognized that in that case the plaintiffs actually did rely on portions of the report substantially.

However, they had a substantial amount of other evidence to support their claims and this report was mainly introduced for the defendant's defenses and in that case it was deemed not to be central.

Carter's complaint is based on RLA-protected speech and organizing, Title VII religious discrimination, U.S. constitutional and statutory retaliation claims that are wholly independent from the question of whether the company had just cause to fire her under the collective bargaining

agreement. That narrow legal issue was what was arbitrated.

Now, the reason why the Court should not convert the 12(b)(6) motion to dismiss into motion for summary judgment is because it fails to satisfy the criteria for conversion set forth in the Fifth Circuit case *Isquith* and also *Bradbury*. The first requirement was -- the first failure is that the materials appended by Southwest are scanty, incomplete and inconclusive, using the wording from *Isquith.* In other words, they do not present the entire record of the arbitration.

So the Court has no way to determine how the arbitrator reached the conclusions it did, what was really within the scope of these legal conclusions, not really factual findings; and so it would be inappropriate to reach those issues without other materials.

If you look at the materials appended by Southwest, the arbitrator's decision, he cites to a transcript that's nowhere in our record that wasn't appended. He cites to a trial record. None of those materials are appended. All we have is an affidavit and the decision, but no other context in which this Court could make a reasonable decision and assess whether to exercise any discretion to give preclusive effect.

The other requirement under *Isquith* is that the decision to convert has to facilitate a decision in the case; and the arbitration materials don't address Count 1, the speech and organizing claim under the RLA; it does not address

Count 2, which is that the social media policies restricted RLA-protected rights; it doesn't address the Title VII claims; and it doesn't -- the only thing it really addresses, arguably, are elements of causation. And it doesn't address adverse action; it doesn't address whether she was exercising constitutionally-protected speech.

And the arbitrator's materials, they contain legal conclusions and vague statements that are very difficult to discern the meaning of. And even separate from these findings that have been propounded from Southwest, as the briefs have set forth, Carter identifies many other factors by which she can prove causation. She alleges those in the complaint; and the Court can't dismiss a complaint, unless it appears beyond doubt, that Carter can't prove any set of facts that would entitle her to relief.

So even assuming *arguendo* that you give credit to some of those facts, the actual factual findings that were propounded by Southwest, you wouldn't be able to -- Carter would still have other factual allegations that would support her intimacy to relief. So going through all this process of converting is futile.

Another factor that the Court should take into consideration is that Fifth Circuit precedent counsels against conversion prior to discovery. We cited the *Paris* case and the *Coleman* case and a case out of the DC circuit called *Ross*. I

know that it's not necessarily binding; but I think that it is important that it recognizes that especially in employment discrimination cases where plaintiffs can only proffer evidence after going through discovery regarding the illegality of the employers motives, it just would circumvent due process rights in order to prematurely convert and grant summary judgment.

And I would say that if the Court does decide to convert that the plaintiff would ask for reasonable notice and opportunity to conduct discovery and an opportunity to present evidence to oppose a motion for summary judgment, but again I don't think that it would make any sense to convert here.

And again the arbitration itself isn't entitled to issue preclusive effect. The standard is set forth in various cases, *Coleman* and *Petro-Hunt*. Not only do the facts have to be identical, but the legal standard used to assess and discern the facts also has to be identical.

In the arbitration you had -- the only question really before the arbitrator is whether there was just cause to fire Carter under the CBA, and the arbitrator's findings that were appended set that out.

The other thing is that the legal conclusions that are put forward by the arbitrator weren't necessary to the arbitrator's decision. For instance, Southwest says that -- made mention of Audrey Stone's testimony and that Audrey Stone didn't have a retaliatory motivation. That is totally beyond

the scope of whether Southwest had just cause to fire Carter. So it's not entitled to any issue of preclusive effect in the first place.

I would like to move on to Ms. Carter's speech claims. It's amply supported by precedent showing that Southwest's objections are all rejected. There are numerous cases -- *Konop* and *Fennessy* out of the Ninth Circuit; *Stefanyshyn* out of the First Circuit; *Conrad*, which is out of the Seventh Circuit; *Roscello*, *Brady* and *Austin* all support the fact that Carter has rights protecting her speech and association under 152(3) and (4).

When Carter made her communications to President Stone, she was engaged in speech about reorganizing the union. The complaint sets forth the entire context of how there was this campaign to recall the union executive board, and Carter's speech explicitly addresses how the employees are looking to remove this executive board that they had fundamental, ideological and political disagreements with and the messages she sent on Facebook strictly address the union's political and ideological activities and this is what the employees were doing in all of the other cases I just mentioned.

For instance, in *Fennessy*, that involved an employee who was reorganizing his union post-certification. He was basically arguing that another union should come into

power. Here they were arguing that the executive board should be replaced, so they were reorganizing their union.

When Southwest fired Carter for those communications, Southwest was indeed interfering with her protected rights under the RLA. And, again, what is particularly important here is that Federal law establishes very robust protections for speech; and the Supreme Court when it announced the standard that again has been adopted in other RLA cases like *Konop,* says that it recognized that labor disputes are heated affairs and employees shouldn't be restrained by what they say and what they do.

It recognized that there were bitter and extreme charges and unfounded rumors, personal attacks, misrepresentations; nevertheless all of that should be protected and they believed that the labor laws should be there to allow labor and management to speak bluntly, recklessly, the Court said, to embellish and engage in hostile language and, as *Konop* and the Supreme Court in *Austin* both agreed, it's given such robust protection, it's protected by a malice standard.

So Southwest would have to show that Carter made these communications with knowledge of their falsity. And maybe they can do that after the motion to dismiss phase, but they can't do it on a motion to dismiss because we're confined and bound by Carter's factual allegations in the complaint.

The social media policies that Southwest has

implemented are not part of the collective bargaining agreement, regardless of what they've argued in their brief. They are separate. And you don't have to interpret either the CBA or those policies to find that they restrain Carter's rights under the Railway Labor Act.

In *Carmona*, the Fifth Circuit explained the difference between interpreting and referring to a collective bargaining agreement and they said that -- and this was for the purpose of establishing that they had jurisdiction over the claims. In that case they said that even if you have to refer to the collective bargaining agreement or, let's say, even referring to the social media policies, unless those policies or the collective bargaining agreement conclusively decide an issue, then the Court will have subject matter jurisdiction; and, of course, pursuant to Carter's claims, it doesn't conclusively resolve the issue. You have to look to her federal rights and whether they restricted her rights is a federal question and, again, this is on all fours with *Carmona*.

Now, as for the Title VII religious discrimination claims, *Abercrombie* shows why all of Southwest's arguments should be rejected. Of course, *Abercrombie* was a Supreme Court case; and it held that employees are not required to give the employer advanced notice of a need for a religious accommodation. Many, if not most of the cases cited by Southwest in their brief are pre-*Abercrombie,* so they became

bad law.

What *Abercrombie* says is that to state a claim you have to have an adverse action because of the religious belief or practice and "because of" means that it was motivated by the employer's desire to avoid accommodation of that religious belief. And it doesn't require that the employer have knowledge of the need; but contrary to what Southwest has argued earlier, the employer did have knowledge of Carter's need for an accommodation prior to firing her.

On March 7th during her fact-finding, Carter explained that she is an evangelical Christian with religious beliefs and she believed that abortion is the taking of human life, and Southwest fired her a week later.

Southwest repeatedly asked her in her fact-finding why did she send these messages; and her response was, "Well, I'm an evangelical Christian and I believe that I need to share these messages to prevent other people from going through pain and because I believe as part of my religion that I need to share the message."

They fired her a week later; so they reputed any type of accommodation. They've cited the *Nobach* case and that case doesn't help Southwest because *Nobach* -- in *Nobach*, the plaintiff hadn't presented any direct or circumstantial evidence of refusal to accommodate or the need to accommodate before her discharge, and here Carter has.

In fact, Southwest should have known from the time these messages were sent that they were of a religious nature. For instance, she sent an article to President Audrey Stone that talked about the Reverend Martin Luther King's beliefs on abortion, and it included the phrase "Seek God now."

In one of the messages posted on her Facebook page it said: "To anyone who is supporting abortion, God help you."

So these were intrinsically religious messages. But at any rate Southwest did know prior to her termination that she was in need of a religious accommodation, so it clearly violates *Abercrombie*. *Chalmers* and other cases they cite are irrelevant because Carter's messages were not directed to the workplace. This is crucial.

Her messages were directed to the union president as part of a dispute with the union in response to the union's participation in a Planned Parenthood Women's March; and they weren't directed to any other employees, they weren't directed to the employer, only to the union president. They were sent to Audrey Stone's -- Audrey Stone TWU website -- I'm sorry -- Facebook account.

Moving on to the retaliation claims, there are two types of retaliation claims. One is the constitutional retaliation and the other is statutory retaliation.

So for the constitutional retaliation claim, the Supreme Court's decision in *Hanson* establishes why Southwest would be considered a federal actor under these circumstances. State action is what forces an employee to pay a union an agency fee. The Supreme Court recognized that in *Hanson* and again in many other cases cited in our brief.

Any time that state action forces an employee to pay a union agency fee, it warrants First Amendment scrutiny and especially where the employee is asserting objections because the fees involve -- the employee is asserting that the fees are being spent on political and ideological activities.

And court cases have said, including *Hanson* and *Lutz* out of the Eastern District of Virginia, say that they warrant First Amendment scrutiny because they have the potential to abridge First Amendment rights.

And Congress's enactment of the Railway Labor Act imposed the federal imprimatur on the force fee requirements and employment objections to them. So when Carter was objecting about how the union was spending employee's fees to support political activities such as participating in this march, she was exercising rights that fell within the federal imprimatur established in *Hanson*. So that is where the state action arises.

I recognize that it is a bit of a curiosity because they are in all other respects private sector entities,

but Hanson is good law that says that they are considered to be federal actors for the purposes of objections to the forced fee requirement under the Railway Labor Act.

And as for the statutory retaliation under the RLA, Southwest's arguments have to be rejected because they've been deemed cognizable in *Roscello*, *Fennessy* and *Konop*, all cases that involve retaliation against an employee for exercising protected rights, protected RLA activity.

And they want to delve into the causal nexus including with the questions about timing, but again that question goes beyond the motion to dismiss stage. Carter's allegations have to be taken as true for the purposes of a motion to dismiss, and Carter has alleged all the facts to support a causal nexus.

Returning to subject matter jurisdiction, despite Southwest's argument that the arbitration -- that she has already litigated these matters in an arbitration, what she has really grieved is whether the employer had a just cause to terminate her employment under the CBA. This argument has been overwhelmingly rejected. They've made this argument multiple times. They've made it in the Fifth Circuit where it's been rejected. They've made it in the Ninth Circuit, where it was also rejected. They lost the same argument in *Carmona*. They lost the same argument in *Fennessy*. And *Hawaiian Airlines v. Norris*, which we cite, and all of these other cases

we cite establish that an employer's claim under the Railway Labor Act under Title VII are all separate and independent claims from the litigation of a just-cause termination. It doesn't matter whether it's been litigated or not. It's completely separate. It's a separate legal inquiry and facts discerned under a separate legal standard.

As far as the distinction they attempt to make between precertification and post-certification rights, again the overwhelming weight of authoritative precedent -- and I say, "authoritative" because I don't consider *Held* to be authoritative either -- demonstrates that Courts have subject-matter jurisdiction over employee speech and organizing rights and that's even after a union is formally certified as the employee's exclusive bargaining representative. That's established again in *Konop*, *Fennessy*, *Conrad* and *Austin*.

Another case -- and, again, I recognize it's outside of the jurisdiction; but it's from the district court in DC. It observed that the Supreme Court did not create a heightened jurisdictional barrier for post-certification cases.

And I think it's also important to consider the ramifications of Southwest's argument. If employees had no rights to oppose their union after the union had been certified, how were the employees ever supposed to remove it if they're solely confined to an arbitration process controlled by the union and the employer?

If this case doesn't exemplify the type of extreme union animus that gives grounds to federal court jurisdiction, I don't know what does. She was fired for exercising her protected RLA speech and organizing rights.

How am I doing on time, Your Honor?

THE COURT: Well, you're --

MR. GILLIAM: Long?

THE COURT: How much time do you need?

MR. GILLIAM: I'd just like to address some of the union arguments pretty quick.

THE COURT: Go ahead.

MR. GILLIAM: Okay. Carter has alleged the facts to --

THE COURT: But to answer your question, you're getting close to 30; so you're fine.

MR. GILLIAM: Okay.

Carter alleged that the union violated its duty of fair representation by seeking and causing her termination. President Audrey Stone knew the consequences of violating Southwest's social media policies. Earlier -- and this is alleged in the complaint -- Audrey Stone implored other employees not to turn each other in for social media violations. She knew that the employer could terminate employees for their violation and the allegations supported by elements of causation that are alleged in the complaint demonstrate a claim that the union treated her differently and

was actually discriminating against both nonmember objector employees and employees who were supporting the recall effort.

There's a factual allegation that 13 of the recall supporters had been targeted by the union's reporting of the recall supporters for the violations of social media policies. Meanwhile they arduously defended union supporters who violated these policies.

Under the RLA, the union owes a fiduciary duty to all the employees in the workplace, members and nonmembers alike; and the union breaches its duty when it discriminates against employees based on their nonmember status. That's from the case called *Del Casal* out of the Fifth Circuit.

And, again, the union is just wrong that Carter didn't plead how the union breached its duty of fair representation. She sets forth that it complained to Southwest management knowing and intending to discipline her while shielding other employees.

And as for the retaliation claim, I've basically addressed why the union would also be considered a federal actor within the scope of *Hanson* because of Carter's objections to their spending of employees fees on political and ideological activities; but as for the adverse action, the Fifth Circuit case we cite, *James,* says that retaliation claims are cognizable against defendants that are either personally involved in the deprivation of rights or when their wrongful

actions are causally connected to the deprivation. And Carter alleges the causal connection.

And it's also well established under federal law that retaliation claims are cognizable against unions. There are Title VII cases out of the First Circuit, the Eighth Circuit and even the Fifth Circuit. There's an NLRA case, all of which are cited in our brief.

And the union raises an argument that Audrey Stone was just another employee who was complaining of harassment, but I think that it -- it would be very, very naive to characterize it in that manner.

Audrey Stone is president of the union that sits down at the negotiating table with Southwest and wields tremendous influence over employees' benefits, wages and terms and conditions of employment. She has a very powerful connection with the employer at the negotiating table.

And the test for determining whether somebody is acting within the capacity of a union president or for the union or just as an ordinary employee are established by traditional principles of agency and that's whether the putative agent has positions and duties -- well, you look at the putative agent's position and duties in the context of their conduct and would it create a reasonable belief that the individual was speaking and acting for the union.

The conversation or at least the communications

that Carter directed to Audrey Stone at the Audrey Stone TWU Facebook page were all addressing union activity. They weren't addressing her in any other capacity, but as the union president and the union's activity. She was the union, and she had for years expressed her opposition to union activity at that address.

And even, again, under the traditional principles of agency, apparent authority is enough. It doesn't have to be any kind of express authorization or ratification.

And finally I would like to note that the union never addresses Carter's Title VII religious discrimination claims; but they are clearly brought against the union and because the union hasn't addressed them, they're waived. I'd also like to renew the objection we made to Local 556's motion to dismiss on the basis that it was untimely filed.

And I'm going to -- one other point I would like to cover, Your Honor, is *Grimes*. *Grimes* does give the Court discretion to give weight to an arbitrator's factual findings. However, if it is to be consistent with Supreme Court precedent, it has to be interpreted as to allow the Court to weigh arbitral findings in conjunction with the plaintiff's evidence.

Grimes itself said itself said that it's not automatic. Southwest is arguing for a *res judicata* type effect to the arbitration. It wants -- despite what it says, it wants

to give automatic preclusive effect to these arbitral findings; but *Grimes* said that it's not automatic and, again, if *Grimes* is to be consistent with Supreme Court precedent, then it has to be construed as weighing -- allowing the Court to give discretion to the weight amongst all of the other facts that are presented by the plaintiff.

I think that's all I have, Your Honor.

THE COURT: Thank you. Let's go off the record for a second.

(Off-the-record discussion.)

(Court is in recess.)

COURTROOM SECURITY OFFICER: All rise.

THE COURT: Thank you.

(Off-the-record discussion.)

THE COURT: So, Ms. Gehrke, anything further on behalf of Southwest Airlines that you have not already said?

MS. GEHRKE: Just a couple of very brief points.

THE COURT: Sure. Go ahead.

MS. GEHRKE: Thank you.

I did want to address briefly, although it sounds like it may not be an issue, this notion of converting the motion to summary judgment. We would not prefer that option. We don't think it's necessary because we think that the arbitrator's decision is properly before the Court since we are challenging subject matter jurisdiction; and even though we

didn't attach the full transcript and all the exhibits, it is very much detailed in Arbitrator Lemons' detailed factual findings and the arbitrator's award where he does lay out --

THE COURT: You don't have to argue anymore. I've already telegraphed that I'm not going to convert it to --

MS. GEHRKE: All right. Very good.

THE COURT: So both sides telling me they don't want to convert it kind of takes it --

MS. GEHRKE: All right.

THE COURT: That takes care of it.

MS. GEHRKE: I would only note a couple of things that counsel said with respect to the preclusive effect of Arbitrator Lemons' arbitration award and I think that he said that Arbitrator Lemons' findings arguably address causation and he was arguing that that wasn't necessarily enough to foreclose the claims that she is pleading here since they are different legal claims.

And I would just reiterate the point that causation is a necessary element of most, if not all, of her legal claims in this case; and so because those factual findings by Arbitrator Lemons as to causation, they would negate necessary elements here which would then make it a failure to state a claim, which amendment would be futile.

And then counsel made the point regarding the company and the union being on the same side and what is an

employee like Ms. Carter supposed to do to challenge the union if they're not fairly representing her in any disputes that she may have with the employer.

And the answer to that is simple and that's the duty of fair representation claim. And she could have filed what we call hybrid action under the Railway Labor Act, which is a breach of contract claim in court with an accompanying breach of the duty of fair representation claim.

So if she truly felt that the company and the union were colluding to her detriment, that was the action that she should have taken to challenge those actions; but she did not. She chose to proceed through the arbitration process all the way to award, and so we believe she is bound by that now.

THE COURT: Okay.

MS. GEHRKE: Thank you.

THE COURT: Thank you. Anything further?

MR. GREENFIELD: Very briefly.

THE COURT: Sure.

MR. GREENFIELD: Actually let me go to the very end of on the issue of timeliness and the waiver of the religious briefing. This is literally the, I believe, third time we have filed our motion to dismiss and this one being on the second amended complaint. They were filed, removed, et cetera. I don't believe any prejudice has been caused by a calendaring error regarding when our motion was filed. The arguments

remained nearly identical to all made previously.

And on the religious briefing waiver, the Court certainly has the ability to hear that. The doctrinal law regarding retaliation, adverse employment action and protected activity does not change regarding those two issues, which leads us into the adverse action part, branch of the retaliation.

Again, every case cited by plaintiff and opposing counsel in their briefing are all distinguishable regarding whether a union can actually retaliate against an employee. In all of those cases, that was where the union actually took direct action against one of their union members for some sort of issue within their internal union policies, never in an issue where it was the outside company who terminated the plaintiff's employment.

Regarding the breach of fiduciary duty, the pleadings say nothing about the issue and there's been very little discussion that in order for that claim to survive, it must inherently abrogate Ms. Stone's federal rights to be free from a hostile work environment and that simply cannot be the case under the law and that's why that claim should be dismissed.

Her presidency, her acting as a president, cannot take away the fact that she is still ultimately an employee of Southwest Airlines.

And just as a final point, we would concur with Ms. Gehrke's assessment on the issue of proper claim being a hybrid claim being brought underlying to arbitration as opposed to here in court.

THE COURT: Okay.

MR. GREENFIELD: Thank you, Your Honor.

THE COURT: Thank you.

Anything real quick on your part that you haven't already said?

MR. GILLIAM: Yes. I will be real quick.

So we did cite in our briefs that there are many other ways to prove causation. Yes, causation is important to Ms. Carter's claims. However, even if you give preclusive effect to the arbitrator's findings, which you shouldn't because many of them are legal conclusions, they're not adjudicative facts as set forth in the *Taylor v. Medcorp* case which addresses Rule 201 and says that you can't give -- you can't take judicial notice of facts that are really mixed questions of fact and law, and I think the same principle applies here. You shouldn't issue preclusive effect to something that is a legal conclusion, maybe discerned from some facts, but where you can't really tell based on appended materials how the arbitrator reached that legal conclusion.

Mentioning the hybrid DFR claim, that is not an exclusive remedy; and many of the RLA protected rights cases

under 152(3) and (4), do establish that explicitly. You can go to, again, *Konop, Fennessy* and *Carmona* and they will set forth that employees have separate and independent rights and private rights of action under 152(3) and (4).

In fact, there's a Supreme Court case that established the private right of action under 152(3) and that's the *Texas New Orleans Railroad* case and it's an older case, but it has basically been reinforced and never overturned.

And as far as the late filing of the motion to dismiss, its main prejudice is if it's granted, in which case it's highly prejudicial to the plaintiff. And the cases that he referred to aren't just internal union disciplinary matters.

And then finally they're asserting a defense based off of President Stone's protections. You've also heard Southwest refer to an undo hardship defense. All of these are defenses that certainly they're entitled to raise, but not at the motion to dismiss phase.

At this phase what we're addressing are whether the facts alleged in the complaint state a plausible entitlement to relief, and we wholeheartedly believe they do.

THE COURT: Okay. Thank you.

All right. Counsel, I appreciate your argument and your briefing. I'm not sure what I said about scheduling was on the record, so in an abundance of caution, I'm going to repeat what I think I said off the record.

I told you you have three weeks from today, but I'm actually going to give you more because of the holidays, in which to submit to the Court a proposed scheduling order. If all three of you sign off on it, there's a high degree of likelihood I will, too. You have until Wednesday, January 10th, to submit that to the Court.

In there, I told you off the record you needed to put the case on a three-week docket. Your first day of trial can be any day of that three weeks, so check with the people you need to be at trial. The case will not be reset absent extraordinary good cause for the docket of the Court, but you won't know that until we get to the trial setting.

The pretrial scheduling final conference will be two Thursdays before the first day of your trial, which will be a Thursday at 1:30, unless your first day of trial falls on a Tuesday because of holidays.

Put your dispositive motion deadline at least 150 days before trial. Yes, at least, because then there's going to be responses and replies and then the Court will have to rule on that.

The Court has invited the parties to consider some of the mediators that we discussed off the record. I will likely give a lot of thought and may order you-all to mediation in the next 60 to 90 days. I appreciate it that you would give it a lot of thought with your respective board and your clients

and your client as well.

If you need to get me on the phone personally as the judge, I should be available to do so as long as all three of are you on the phone and we get some advance notice of that in the next week or so.

But if you-all end up agreeing that you do want to go to mediation and who the mediator should be, you can check with these people's calendars or you can come up with someone else. Then you just need to advise -- you can do it in a letter to me or you can call my law clerk on this file and go through the judicial assistant. Her number is on the phone and you can say, "We're all on the phone. We would like to talk to Blair Watler," who is the law clerk on there and you can tell her, "Yes, we've agreed. This is who we propose" and she will come find me. The Court will immediately do an order of referral to mediation and I'll set a deadline with the mediator.

So that's where we are.

Anything else on the record on behalf of plaintiff?

MR. GILLIAM: No, Your Honor.

THE COURT: On behalf of Southwest?

MS. GEHRKE: No, Your Honor.

THE COURT: The union?

MR. GREENFIELD: No, Your Honor.

THE COURT: Thank you for being here. I hope we didn't delay your trips back to your wherever home is. Thank you very much for a most interesting afternoon.

COURTROOM SECURITY OFFICER: All rise.

(WHEREUPON, the proceedings were adjourned.)

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REPORTER'S CERTIFICATE

I, Lanie M. Smith, CRR, RPR, Official Court Reporter, United States District Court, Northern District of Texas, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

/s/ Lanie M. Smith
Official Court Reporter